EVALUATION REPORT
ON THE DEVELOPMENT AND IMPLEMENTATION
OF A LUMMI NATION
SAFE DRINKING WATER MANAGEMENT PROGRAM

December 2004

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EXECUTIVE SUMMARY

A safe and reliable supply of drinking water is essential for residential, commercial, municipal, and industrial development and existence. The Federal Safe Drinking Water Act (SDWA) is intended to protect public health by regulating public drinking water systems and sources. The SDWA also includes the establishment of national drinking water quality standards, wellhead protection programs, and regulation of underground injection wells. Provisions of the SDWA allow Indian Nations to be delegated authority to administer the SDWA in "Indian Country." This evaluation is intended to provide information that will allow the Lummi Nation to determine if it should seek this delegation or continue to rely on the United States Environmental Protection Agency (EPA) to administer the SDWA on the Lummi Nation Reservation (Reservation).

The Lummi Nation Wellhead Protection Program is one element of the SDWA that the Lummi Nation has undertaken to prevent contamination of ground water resources (LWRD 1997). This protection is important because the ground water is the primary potable water supply for the Lummi Nation and residents of the Reservation. Ample supplies of good quality ground water distributed by public water systems in compliance with the SDWA are essential to serve the purposes of the Reservation as a permanent economically viable homeland of the Lummi Nation and its members.

This report provides information on developing and implementing a Lummi Nation Safe Drinking Water Management Program. The goal of a safe drinking water management program is to protect the health of the people of the Lummi Reservation by assuring safe and reliable drinking water. A safe drinking water management program could include the following elements:

- Protection of water sources and prevention of water supply contamination,
- Monitoring of public and private drinking water systems,
- Technical assistance,
- Emergency response,
- Funding and review of system improvements,
- Water system coordination and planning,
- Public education, and
- Enforcement of safe drinking water regulations.

The purpose of this report is to describe the steps to seek and obtain primary responsibility for the enforcement (primacy) of SDWA elements on the Lummi Reservation, to evaluate the costs and benefits of primacy, and to provide a recommended action plan.

Based on this evaluation, it is recommended that the Lummi Nation:

1. Pursue SDWA primacy for the PWSS program over the next five years at an estimated cost of $106,000.

2. Complete the planned evaluation of seeking authority to administer Section 402 of the CWA during 2005 and, following this evaluation, make a determination on whether or not to seek primacy for the UIC program.

Grant funding from the EPA should be secured to develop the Lummi Nation primacy programs, adopt regulations, and to begin program implementation.

1. INTRODUCTION

A safe and reliable supply of drinking water is essential for residential, commercial, municipal, and industrial development and existence. The Federal Safe Drinking Water Act (SDWA) is intended to protect public health by regulating public drinking water supplies in the United States. Provisions of the SDWA allow Indian Nations to be delegated authority to administer the SDWA in "Indian Country." This evaluation is intended to provide information that will allow the Lummi Nation to determine if it should seek this delegation or continue to rely on the United States Environmental Protection Agency (EPA) to administer the SDWA on the Lummi Nation Reservation (Reservation).

The Lummi Nation Natural Resources Department's Water Resources Division established a Comprehensive Water Resources Management Program (CWRMP) in response to Lummi Indian Business Council (LIBC) resolutions 90-88 and 92-43. The purpose of the CWRMP is to ensure that the Reservation land and water resources are safeguarded against surface and ground water degradation during planning and development activities. The CWRMP is one of several incremental steps the Lummi Nation has taken to provide for the health and safety of the Nation's members which is a core responsibility of government.

Under the CWRMP, the Lummi Nation Wellhead Protection Program was developed to protect wellhead areas within the Reservation from contaminants which may have any adverse effect on the health of persons or on the integrity of the ground water resources of the Lummi Nation (LWRD 1997). A wellhead protection program is one element of the Federal Safe Drinking Water Act that the Lummi Nation has undertaken to prevent contamination of ground water resources. This protection is important because the ground water is the primary potable water supply for the Lummi Nation and residents of the Reservation. The SDWA also includes the establishment of national drinking water quality standards, regulations for public water system operation, and regulation of underground injection wells.

Ample supplies of good quality ground water distributed by public water systems in compliance with the SDWA are essential to serve the purposes of the Reservation as a permanent economically viable homeland of the Lummi Nation and its members. The Lummi Nation finds that assuring that public water systems on the Reservation are in compliance with the SDWA has a direct, serious, and substantial effect on the political integrity, economic security, and the health and welfare of the Lummi Nation, its members, and all persons present on the Reservation, and that non-compliant public water systems, if left out of compliance, could cause adverse impacts. The development and administration of a Lummi Nation Safe Drinking Water Management Program, which enforces elements of the SDWA on the Reservation, is a responsibility of the LIBC as the governing entity on the Reservation.

This report provides information on developing and implementing a Lummi Nation Safe Drinking Water Management Program. The purpose of this report is to:

- Describe the steps to seek and obtain primary responsibility for the enforcement (primacy) of SDWA elements on the Lummi Reservation;
- Evaluate the costs and benefits of primacy; and
- Provide a recommended action plan.

In a similar process, the Lummi Nation has already applied to the EPA for delegation to administer the Clean Water Act (CWA) Section 303 (c), water quality standards, and CWA Section 401, certification.

1.1 DRINKING WATER RESOURCES MANAGEMENT ON THE RESERVATION

Over 95 percent of the residential water supply for the Lummi Reservation is pumped from local ground water wells. As a finite resource, ground water is one of the most important and critical resources of the Lummi Nation.

Reservation ground water resources are particularly vulnerable to pollution due to geographic and hydrogeologic conditions, which may be exacerbated by future growth and development on the Reservation. The Reservation, which is compromised of approximately 12,500 acres of uplands and approximately 7,000 acres of tidelands, is located in a coastal area along the inland marine waters of the Puget Sound and Georgia Strait. Most of the existing water supply wells on the Reservation are located within a half mile of marine waters. Progressive salt water intrusion already has led to the closure of several of these public water supply wells. Increased pumping, possible future reductions in ground water recharge areas as the forested uplands of the Reservation are converted to residential uses, and rapid economic and population growth could further threaten the Lummi Nation's ground water resources if such activities are not managed effectively.

Ground water contamination could lead to the loss of the primary water supply source for the Reservation because water supply wells are difficult to replace, ground water contamination is very expensive to treat, and some damages to ground water caused by contamination may be impossible or unfeasible to mitigate. Alternative water sources to serve the needs of the Reservation are expensive and may not be available in amounts sufficient to replace existing supplies and to provide for future anticipated tribal economic and residential growth. Moreover, alternative water sources would require substantial amounts of funding for the infrastructure upgrades that would be necessary to import larger volumes of water onto the Reservation.

1.2 WATER SYSTEMS ON THE LUMMI RESERVATION

Currently, potable water supply systems on the Reservation can be categorized into three ownership types:

- Two Lummi Nation public water systems operated by the Lummi Tribal Water District (LTWD),

- Eight non-tribal associations that operate public water systems registered with the State of Washington Department of Health (DOH) as shown on Figure 1, Map of Lummi Reservation Water Systems.
    - Group A Systems- Neptune Beach, Sandy Point Improvement Company, Sunset, Georgia Manor
    - Group B Systems- Harnden Island View, Leeward-Northgate, Gulfside Mobile Home Park, and Bel Bay.
    - Approximately 129 individual or small group domestic water supply wells

The LTWD currently serves the Reservation using a network of four wells and supplemental water from the City of Bellingham in two separate subsystems: the Lummi Peninsula water system and the Lake Terrell/North Red River Road water system. The Lummi Peninsula system currently serves most of the Lummi Nation members on the Reservation and approximately 205 non-tribal residences (20 percent of the LTWD customers). There are a total of approximately 849 residential connections and 60 commercial/municipal connections on the LTWD system. Approximately 124 of those connections are new connections added in October 2004 as a result of an integration project with the Gooseberry Point Water Association. The LTWD currently purchases water from the Sandy Point Improvement Company to provide water to approximately 35 Lummi Nation member residences in the Lake Terrell/North Red River Road subsystem. A project supported by the U.S. Department of Agriculture Rural Development is underway to provide an independent water supply to the Lake Terrell/North Red River Road subsystem. Three new production wells will be added to the LTWD system during 2005 as part of the Gooseberry Point Water System Integration Project and the Northwestern Lummi Reservation Water System Improvement Project.

The eight non-tribal water associations and 129 individual or small group systems serve predominately non-tribal members in residential areas along the Reservation shorelines. These non-tribal water associations on the Reservation use ground water. In 1990, the Lummi Nation offered to consolidate the non-tribal systems with the tribal system, to upgrade and manage the systems for aquifer protection, and to meet existing and future legal obligations for service. One of the water associations (Horizon Heights) accepted the offer and the system was upgraded and integrated into the LTWD's system. A second former water association purchased by the Lummi Nation in the late 1980s (Fisherman's Cove) was upgraded and integrated into the LTWD system at about the same time. In 1991 the LTWD shut down the former Fisherman's Cove Water Association well and another nearby tribal public supply well due to salt water intrusion. The 124 connections of the Gooseberry Point Water Association were integrated into the LTWD in 2004. The remaining eight non-tribal water associations refused the Lummi Nation's offer to become integrated into the LTWD and are currently entirely dependent on wells adjacent to or within the association boundaries. In the event that a portion of the aquifer becomes unusable, these entities would have to develop an additional alternative source or become LTWD customers under an arrangement with the Lummi Nation. In most cases, the existing water distribution system would have to be enlarged to serve these areas.

Similar to the LTWD system, the four non-tribal Group A public water systems are also regulated by the SDWA. However, rather than being administered by the EPA, Washington

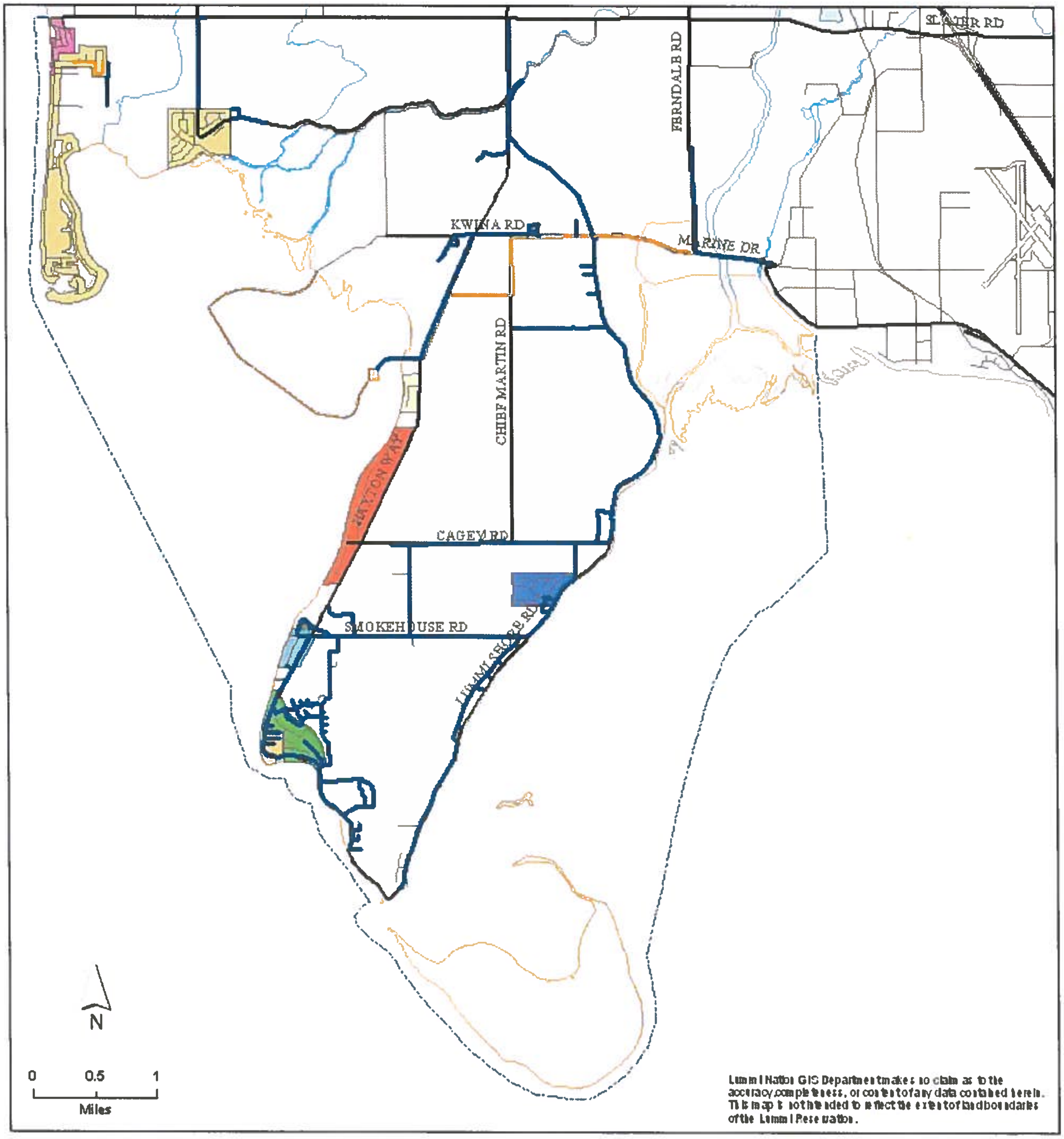

Figure 1. Public Water Systems on the Lummi Reservation

State has exerted jurisdiction over these non- tribal water associations and the SDWA is currently administered by the DOH for these systems.

The DOH defines Group A systems as those which have fifteen or more service connections or regularly serve twenty-five or more people sixty or more days per year. The Group B systems are defined and regulated by state law only and are not regulated under the federal SDWA. The DOH defines a Group B system as: a public water system constructed to serve less than fifteen residential services regardless of the number of people; or constructed to serve an average nonresidential population of less than twenty-five per day for sixty or more days within a calendar year; or any number of people for less than sixty days within a calendar year.

The DOH definition of a public water system excludes those serving only one single-family residence and systems with four or fewer connections all of which serve piped water for human consumption to residences on the same farm. Other than the Lummi Nation Wellhead Protection Ordinance (LIBC 2004), there are no tribal, state, or federal regulations developed pursuant to the SDWA that address existing systems serving a single residence.

Identification of a Group A system's general compliance status is provided by the DOH public water system operating permit color classifications:

- Green: Systems are in substantial compliance with all requirements and are viewed as adequate for existing uses and additional connections up to the approved number of connections unless they are already at capacity.
- Yellow: Systems are substantially in compliance with all requirements except they 1) have been notified to submit a water system plan but have not satisfied the planning requirement; or 2) are under a compliance agreement for a state significant non-complier violation. These systems are viewed as adequate for existing uses and additional connections up to the approved number unless otherwise limited by a compliance agreement.
- Blue: Systems are substantially in compliance with requirements except the system does not meet design approval requirements or has exceeded the number of approved connections established by the department. These systems are viewed as adequate for existing uses, but not adequate for adding new connections.
- Red: Systems are in substantial non-compliance with requirements. These systems are viewed as inadequate for existing uses and no additional connections are allowed. This may result in denial of home loans, building permits, on-site sewage disposal permits, food service permits, liquor licenses, and other permits or licenses for properties served by the system.

The operating permit status of the non-tribal systems on the Reservation as reported in the DOH database November 2004 is (Miller 2004):

Georgia Manor - Blue
Neptune Beach - Blue
Sandy Point Improvement Company - Green

Sunset - Green

Group B systems do not require operating permits. However, sanitary surveys[1] are conducted periodically by the Whatcom County Health and Human Services Department (WCHHSD). The status of the Group B systems on the Reservation is (Miller 2004):

Harnden Island View - Sanitary survey conducted by WCHHSD in 2004.
Leeward-Northgate - No recent sanitary survey. WCHHSD will probably complete in June 2005.
Gulfside Mobile Home Park - No recent sanitary survey. WCHHSD will probably complete in June 2005.
Bel Bay (Kel Bay) - No information obtained from WCHHSD.

1.3 UNDERGROUND INJECTION WELLS ON THE LUMMI RESERVATION

There are currently no underground injection well permits or projects completed requiring such permits on the Reservation. Engineering reports are under development for a Membrane Bioreactor (MBR) wastewater treatment plant and drain field to handle wastewater from the Silver Reef Casino, the Lummi Nation governmental facilities, the Northwest Indian College, and residential units north of the Kwina Estate property. This project will require a Class V Underground Injection Control (UIC) authorization by rule or permit from EPA Region 10 described in Section 2.1.2. Class I, II, III, and IV underground injection wells are unlikely to occur under current Reservation development conditions, geologic setting, and space limitations.

1.4 LUMMI NATION SAFE DRINKING WATER MANAGEMENT PROGRAM

The goal of a safe drinking water management program is to protect the health of the people of the Lummi Reservation by assuring safe and reliable drinking water. A safe drinking water management program could include the following elements:

- Protection of water sources and prevention of water supply contamination,
- Monitoring of public and private drinking water systems,
- Technical assistance,
- Emergency response,
- Funding and review of system improvements,
- Water system coordination and planning,
- Public education, and
- Enforcement of safe drinking water regulations.

The Lummi Nation has begun to address prevention of drinking water contamination through a number of additional actions including: a wellhead protection program; monitoring of water level and chlorides in water supply wells; efforts to establish a coordinated pumping regime;

[1] A sanitary survey is a detailed evaluation and inspection of a water system's sources, treatment, distribution system, storage, and operational procedures to ensure protection from all pollution sources.

and water quality monitoring by the Lummi Tribal Water District (LTWD) pursuant to the SDWA. In addition, the Lummi Nation has established regulations to protect drinking water sources from contamination in the Lummi Nation Code of Laws Title 17 Water Resources Protection Code. This code includes wellhead protection, storm water management, stream and wetland management, water quality standards, and a water use permitting system elements which are intended to protect the quality and quantity of source water available for domestic and commercial needs. Title 17 currently does not directly address the management of public or private drinking water distribution systems and the final quality and reliability of water at the tap. Seeking primacy for the SDWA is one way to potentially improve drinking water quality at the tap and is a responsibility of the Lummi Nation as the governing entity on the Reservation.

This report includes seven sections:

- This Section 1 provides background information on the current Lummi Nation water resources management on the Reservation and a description of the current public water systems and injection wells.
- Section 2 describes the federal SDWA, the regulations, and how they are currently administered on tribal and non-tribal land in Washington.
- Section 3 outlines the general requirements for tribal primacy for selected elements of the SDWA
- Section 4 identifies general potential benefits and limitations or problems associated with seeking and obtaining primacy specific to the Lummi Nation.
- Section 5 describes estimated costs, potential funding sources, and a recommended action plan.
- Section 6 is a summary and conclusion to this evaluation.
- Section 7 lists references used in this report.

Appendix A through D contain additional detailed information referred to in the report.

2. FEDERAL SAFE DRINKING WATER PROGRAM AND ADMINISTRATION

This section summarizes the federal safe drinking water program and its administration by the Environmental Protections Agency (EPA) and other agencies on both Reservation and non-Reservation lands.

2.1 FEDERAL SAFE DRINKING WATER ACT SUMMARY

The Federal Safe Drinking Water Act (SDWA), Public Law 93-253, 42 U.S.C. 300f et seq. was originally passed by Congress in 1974 to protect public health by regulating the nation's public drinking water supply. The law was amended in 1976, 1977, 1980, 1984, 1986 and most recently re-authorized and amended in 1996. The legislation requires regulations to protect drinking water and its sources in rivers, lakes, and ground water. The SDWA does not regulate water systems which serve less than fifteen connections or fewer than twenty-five individuals.

The U.S. Environmental Protection Agency (EPA) is the primary administrator of the SDWA regulations, which are found in the Code of Federal Regulations (CFR), Title 40 Parts 141-146. These complex regulations are continually evolving to include new water quality parameters and drinking water protections. The main components of the SDWA regulations can be categorized in the programs listed below:

A. Public Water System Supervision (PWSS) Programs
- National Primary and Secondary Standards for public drinking water quality
- Requirements for certified public water system operators and laboratories
- Ensuring the public is informed about their drinking water quality
- Issuing variances and exemptions for small systems
- Providing technical assistance for systems to achieve compliance
- Legal authority for enforcement using administrative compliance orders and penalties

B. Protection and Prevention Programs
- Source water protection through state and tribal assessments and well head protection programs
- Regulation of five classes of underground injection wells, such as wells associated with oil and gas exploration, aquifer storage and recovery wells, and large septic system drain fields. This is known as the Underground Injection Control (UIC) program.

C. Other Programs
- Establishment of the Drinking Water State Revolving Fund (SFR). One and one-half percent of the SRF can be used for grants to Indian tribes and Alaska Native villages.
- Drinking water studies and research

2.1.1 SDWA Public Water System Supervision Program

The SDWA authorizes the EPA to set national health-based standards for drinking water to protect against both naturally-occurring and man-made contaminants that may be found in drinking water. The national standards for drinking water are science-based and intended to

protect against health risks while also considering available water treatment technology and costs. The National Primary Drinking Water Regulations set enforceable maximum contaminant levels (MCLs) for contaminants in drinking water and establish required treatment techniques to remove contaminants. Public water systems are responsible for ensuring that contaminants in tap water do not exceed the primary standards. The EPA has also set National Secondary Drinking Water regulations to control aesthetic contaminants in drinking water, such as chlorides, iron, manganese, and sulfate. Public water system owners must test their water on a prescribed frequency for specified contaminants, report the results to the primacy agency, notify users of problems, and treat the water if necessary so that the MCLs are not exceeded.

Originally, the SDWA focused primarily on testing and treatment as the means of providing safe drinking water at the tap. The 1996 amendments recognized source water protection, operator training, funding for water system improvements, and public information as important components of ensuring a safe drinking water supply.

The responsibility for making sure public water systems provide safe drinking water is divided among the EPA, states, tribes, water systems, and the public. The EPA or states or tribes with primacy are responsible for supervising public water systems by monitoring water systems' testing for contaminants at certified laboratories, reviewing plans for water system improvements, conducting on-site inspections and sanitary surveys, providing training and technical assistance, overseeing the managerial, technical, and financial capacity of water systems, and taking compliance/enforcement actions against water systems not meeting standards. If an Indian Nation has not applied for and obtained primacy for the SDWA from EPA, then the EPA remains responsible for administering the SDWA on the reservation. Consumer notification is required when primary water quality standards are violated and periodic Consumer Confidence Reports must be made available to users on larger systems.

2.1.2 SDWA Underground Injection Control Program

The goal of the Federal Underground Injection Control (UIC) Program is to prevent contamination of underground sources of drinking water (USDW). A USDW is defined as an aquifer, or its portion, which currently serves as a source of drinking water for human consumption, or produces a significant quantity of water (greater than 1 gallon per minute), and contains fewer than 10,000 mg/liter of total dissolved solids. The broad definition of a USDW was mandated by Congress to ensure that future USDWs would be protected, even where those aquifers were not currently being utilized as a drinking water source or could not be used without water treatment (EPA 2002). The regulations include criteria for exempting portions of an aquifer from definition as an USDW in order to allow continued or future injection into them.

The regulations require assurance that injection wells will not cause the movement of contaminated fluids into USDWs that would cause a violation in the source water of any federal primary drinking water standard (MCLs) listed in 40 CFR 141. The extent to which a USDW is threatened depends on the nature of the fluids being injected, the volume of the fluid being injected, the hydraulics of the flow system (pressure in the injection zone and

overlying USDWs), and the amount of fluid that may enter the USDW via one or more of the pathways. The injection of a hazardous waste into a poorly constructed well would pose a high potential threat of endangerment to USDWs, while the injection of high quality river water directly into a USDW using a recharge well may represent a low threat. Regardless of the threat level, all owners and operators of all injection wells fall under the regulatory control of the UIC Program (EPA 2002).

The UIC regulations require authorization by rule or permit to site, construct, operate, monitor, and close an injection well. Wells authorized by rule are subject to the specific requirements set by the regulations, but the operator is not subject to the public participation and other procedures that are necessary to obtain a permit. The regulations separate injection well into the five classes so that similar design and operation have similar performance criteria summarized in Table 1. Every new Class I, Class II (including enhanced recovery), and Class III well is required to apply for and receive a permit prior to construction or injection. Class V wells are generally authorized by rule, but the owner/operator of a Class V well must notify the UIC Program administrator of the proposed or existing activity and provide certain inventory information.

2.2 CURRENT SAFE DRINKING WATER ACT (SDWA) ADMINISTRATION

This section describes SDWA administration on tribal and non-tribal lands in Washington.

2.2.1 SDWA Administration on Non-Tribal Lands in Washington

The EPA is the primary administrator of the SDWA. The original Act also authorized the EPA to delegate responsibilities to the states for implementing and enforcing two regulatory programs: the Public Water System Supervision (PWSS) and the Underground Injection Control (UIC). The EPA has granted primacy for the PWSS program to the DOH and the roles and responsibilities are detailed in the current agreement, July 1, 2003-September 30, 2005 (DOH/EPA no date). Washington State has adopted regulations on safe drinking water for Group A systems, Drinking Water Regulations, Chapter 246-290, Washington Administrative Code (WAC).

In addition, the State has adopted regulations, Chapter 246-291 WAC, which apply to systems serving less than twenty-five people or fifteen connections (not regulated by the SDWA), called Group B public water systems. The DOH has interagency agreements with county health jurisdictions to designate the roles and responsibilities of each agency to provide public water system oversight. The DOH and the WCHHSD have a Joint Plan of Operation (JPO) for the County to generally oversee the approximately 196 Whatcom County Group B systems and perform some initial assistance in surveillance of Group A systems (DOH/WCHHSD 2002-2007). The JPO and other regulations regarding water availability approvals for building permits and subdivision approvals are codified in Whatcom County Code Chapter 24.11, Drinking Water.

Table 1. Injection Well Classes (EPA 2002)

INJECTION WELL CLASS	DEFINITION	EXAMPLE
I	a) Injection of industrial and municipal waste below the lowermost formation containing an underground source of drinking water (USDW) within 1/4 mile of the wellbore; b) Injection of hazardous waste, as defined by 40 CFR 261 below the lowermost formation containing a USDW within 1/4 mile of the wellbore; and c) Injection of radioactive waste below lowermost aquifer containing a USDW within 1/4 mile of the wellbore.	Chemical Company disposal of nonhazardous fertilizer below lowermost USDW. Disposal of secondary treated municipal waste below lowermost USDW.
II	a) Disposal of fluids brought to the surface in connection with natural gas storage operations or conventional production of oil and gas which may be commingled with waste waters from gas plants that are an integral part of production operations; b) Injection of fluids for enhanced recovery of oil or gas; and c) Injection for storage of hydrocarbons that are liquid at standard temperature and pressure.	Disposal of produced water, drilling waste, spent well workover fluids, often commingled with gas plant wastes that are not defined as hazardous at the point of injection. Injection of gas for pressure maintenance. Secondary water flood in a depressurized reservoir. Injection of oil into a salt dome for storage.
III	Injection of fluids for extraction of minerals including: a) solution mining of copper and uranium from areas which have not been conventionally mined; b)solution mining of potash, or salts; and c) steam injection using the Frasch Process for recovery of sulphur.	Uranium solution mining of a shallow "rollfront" deposit in a potable water aquifer using multiple injection and extraction wells. In-situ potash recovery using multiple injection and extraction wells.
IV	a) Disposal of hazardous or radioactive waste into or above a formation which contains an underground source of drinking water. Construction and maintenance is banned unless approved under provisions of 40 CFR 144.13(c); and b) Injection of waste water containing hazardous waste into or above a USDW, as part of an EPA or State approved CERCLA or RCRA cleanup which meets the criteria outline in Section 7010(b) of HSWA.23 into the contaminated area as part of RCRA approved cleanup.	Release of solvents (a listed hazardous waste) from the electronics manufacturing process into a runoff control well for a parking lot (banned). Regular disposal of wastes from an industrial process into shallow disposal wells where wastes are defined as hazardous (banned). Injection of wastewater pumped from cleanup of railroad tie treatment facility back.
V	All other types of injection wells. This well class may include, but is not limited to: irrigation return flow wells, cesspools, nonhazardous industrial disposal systems into USDWs, storm water control wells, mining sand backfill wells, recharge wells, brine extraction wells, etc. A national study identified 32 different types of wells. Most of these wells are shallow and penetrate only the surficial aquifer.	Dry wells in parking lots or areas of towns with no storm sewers for runoff control, where runoff is not hazardous. Recharge of aquifer to prevent sea water intrusion. Drain fields associated with multi-family dwellings, serving more than 20 people per day. Recharge wells associated with reinjection of treated water at LUST, RCRA, and CERCLA sites* where fluid is not hazardous under 40 CFR 261.

***NOTE:** LUST -Leaking Underground Storage Tank (The LUST Program mandates cleanup of sites where leaks have occurred). RCRA -Resource Conservation and Recovery Act (This law requires programs regulating the generation, treatment, and disposal of solid and hazardous waste and the installation and cleanup of underground storage tanks). CERCLA -Comprehensive Environmental Response, Compensation and Liability Act (This law establishes the criteria for listing, investigating, and cleaning up sites using a fund set up by law [Superfund]).

The Washington State Department of Ecology has full primacy for the UIC program on non-tribal lands and has adopted Chapter 90.48 RCW and regulations Chapter 173-218 and 173-200 WAC to protect existing and future beneficial uses of underground drinking water. The primacy agreement for the UIC program is part of the broader Environmental Performance Partnership Agreement between the EPA and Ecology (State Ecology/EPA 1986) and is funded in part by a Performance Partnership Grant. The state UIC regulations are currently under revision, with a proposed adoption date of January 2005, to reflect recent changes in the EPA regulations. In Washington State, all sources of ground water are considered potential drinking water sources and Class I, III, and IV injection wells are banned.

2.2.2 SDWA Administration on Tribal Lands in Washington

The EPA Region 10 Drinking Water Program currently regulates approximately 100 public water systems in Region 10 Indian Country (EPA Region 10 2002). These public water systems include tribally-owned and operated water systems, systems owned and operated by individual tribal members, and systems operated by non-tribal individuals and organizations. Preliminary EPA investigations indicated that an additional 180 public water systems in Indian Country in Idaho, Oregon, and Washington are reporting to state drinking water programs (EPA Region 10 2002).

The EPA has allowed this mix of regulatory authority in Indian Country to persist in the interest of protecting public health for all reservation residents (EPA Region 10 2002). However, in instances where a tribe has requested EPA assistance, or a state program has been unsuccessful in obtaining compliance with drinking water requirements, the EPA has asserted regulatory authority over individual water systems as needed (EPA Region 10 2002). The EPA attempts to balance its regulatory authority and trust responsibility to tribes while ensuring ongoing public health protection to all Indian Country residents (EPA Region 10 2002).

The general position of the EPA Region 10 office is to recognize the need to move towards supporting Indian tribes' control over their lands, while protecting public health. This process acknowledges the limited present and anticipated EPA resources to take on responsibility for significant numbers of additional drinking water systems that currently report to state programs. The EPA's current funding allocation formula does not provide for reallocating funds from state programs to the EPA Direct Implementation (DI) program in Indian Country. Under the present system, even if the state drinking water program funding is reduced proportionately to transfer state-regulated systems to EPA control, the EPA DI program would not receive a commensurate increase in program funding. According to the EPA, the result would be a net loss of the current state-supported assistance in Indian Country that could result in a reduction in public health protection for all residents located in Indian Country unless additional DI program funding is allocated (EPA Region 10 2002).

The EPA Region 10 finds that the best way to meet its tribal trust responsibility, while also protecting public health, is through a managed transition from State to EPA/tribal control of drinking water systems in Indian Country (EPA Region 10 2002). The Lummi Nation's position is that unless the EPA has approved SDWA primacy for an Indian nation or tribe,

the EPA has SDWA regulatory authority in Indian Country for both tribal and non-tribal public water systems (Deardorff 2004). The Lummi Nation advocates that adequate resources be allocated for direct implementation of the SDWA by the EPA for non-tribal systems on the Reservation that currently report to the DOH. Currently, the EPA Region 10 oversees only the LTWD's systems on the Lummi Peninsula and the northwestern upland portion of the Reservation. The two LTWD systems are identified respectively as the Lummi District #1 Gooseberry and the Lake Terrell/Red River water systems in the EPA Safe Drinking Water Information Data System (SDWIS).

The EPA Region 10 also directly implements the UIC regulations for all wells within the external boundaries of the Reservation (Indian Country-See 40 CFR 144.3). This includes wells on private land and private mineral rights if the location is "Indian Country" (EPA 2002). "Indian Country" is defined in 18 U.S.C. 1151 as:

> (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
>
> (b) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and
>
> (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The UIC program was recently moved from the EPA Office of Water to the EPA Office of Compliance and Enforcement (Slate 2004).

3. TRIBAL PRIMARY RESPONSIBILITY FOR SDWA ENFORCEMENT (PRIMACY)

In the original SDWA, the EPA was solely responsible for the enforcement of PWSS and UIC programs "Indian Country". However, in 1986 along with other amendments, a new section 1451 entitled "Indian Tribes" was added to the SDWA (42 U.S. Code 300j-11). This newer section required the EPA to issue regulations to treat tribes in the same manner as states under the SDWA. Tribes were to first obtain "treatment as a state" (TAS) status as a prequalification step to be eligible to apply for primacy. This prequalification step was viewed as burdensome and time-consuming to many (OEG 1998). Therefore, in 1992 EPA adopted a working group's recommendations intended to simplify the process and amended the SDWA regulations to eliminate treatment as a state review as a separate step (59 FR 64339, December 14, 1994). Thus, tribes no longer need to go through a TAS prequalification process *separate* from the application for PWSS or UIC program approval. In this section, the current statutory criteria to apply for tribal primacy and the application requirements for PWSS and UIC program primacy are described.

3.1 STATUTORY CRITERIA TO APPLY FOR TRIBAL PRIMACY

Tribes must meet the three statutory criteria of 42 U.S. Code 300j-11(b) (1) before they are eligible to apply for PWSS and UIC program development grants and primacy:

> (1) The Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
>
> (2) The functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
>
> (3) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

The EPA will evaluate compliance with the above criteria while reviewing the primacy application. Once a tribe has met the criteria for any CWA or SDWA program, only information unique to another program needs to be submitted (40 CFR 142.76 (f)). The additional information required for the PWSS program eligibility as described in 40 CFR 142.76 is:

(c) A map or legal description of the area over which the Indian Tribe asserts jurisdiction; a statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's jurisdictional assertion (including the nature or subject matter of the asserted jurisdiction); a copy of those documents … which the Tribe believes are relevant…; and a description of the locations of the public water systems the Tribe proposes to regulate.

(d) (5) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary enforcement responsibility, including a description of the

relationship between owners/operators of the public water systems and the agency.

(f) A description of the technical and administrative capabilities of the staff to administer and manage an effective PWSS program or a plan which proposes how the Tribe will acquire additional and/or technical expertise. The plan must address how the Tribe will obtain funds to acquire the additional administrative and technical expertise.

The Lummi Nation has previously applied for and obtained "Treatment as a State" (TAS) status for CWA Section 106 in 1990 and CWA Section 319 in 2002. An application for delegation to administer CWA Sections 303(c) and 401 has been pending with the EPA since 1995. The Lummi Nation has provided supplemental information to the EPA during the intervening nine years. An affirmative decision on the pending application is expected during 2005.

As stated previously, ground water is the primary source of drinking water on the Reservation. Ground water of adequate quality and quantity is essential for the purposes of the Reservation as a permanent economically viable homeland. Although there are a number of individual private wells, this ground water is generally pumped and distributed by public water systems. Public water systems operating in non-compliance with the SDWA have a direct, serious, and substantial effect on the political integrity, economic security, and the health and welfare of the Lummi Nation, its members, and all persons present on the Reservation. Therefore, the Lummi Nation views it as essential that the Lummi Nation has jurisdiction over all public water systems within the Reservation boundaries including non-tribally owned public water systems serving mostly non-tribal members on fee lands.

In evaluating the tribal capability criterion (f), above, the EPA considers the following found in 59 FR 64339, December 14, 1994:

- The tribe's previous management experience;
- Existing environmental or public health programs administered by the tribe;
- The mechanisms in place for carrying out the executive, legislative, and judicial functions of the tribal government;
- The relationship between regulated entities and the administrative agency of the tribal government which will be the regulator; and
- The technical and administrative capabilities of the staff to administer and manage the program.

The EPA also recognizes that tribes may not have substantial experience administering environmental programs, but a lack of such experience will not prevent a tribe from demonstrating capability, so long as it shows related management and technical skills or submits a plan describing how it will acquire those skills (59 FR 64339 Section 6 (5)).

3.2 PWSS PRIMACY APPLICATION REQUIREMENTS

In an application for PWSS primacy, the Lummi Nation would need to demonstrate to the EPA that it meets the five basic primacy requirements in 42 CFR 142.11. These requirements are further discussed in the EPA document "Indian Primacy Procedures Handbook: Public Water System Supervision and Underground Injection Control Programs" (EPA 1993) which will be referred to as the Handbook throughout this report.

Primacy Requirement No. 1

The tribe must have adopted regulations no less stringent than the EPA regulations currently in effect for public drinking water systems and underground injection.

Any variations from the EPA regulations must be identified and demonstrated to be as strict as the comparable EPA regulation. Additional rules continue to be added to the EPA regulations and tribal regulations would have to be revised periodically to include new rules in order to maintain primacy.

The Lummi Nation may also need to consider the Washington State Drinking Water Regulations, WAC 246-290 for Group A public water systems to promote regional consistency in design and construction. It would be optional for the Lummi Nation to regulate what the State defines as Group B water systems (not included in the SDWA). However, the regulation of Group B systems may enhance the goal of ensuring safe drinking water. There are currently approximately four Group B public water systems identified on the Lummi Reservation. It may also be important to consider the Whatcom County Coordinated Water System Plan (WCCWSP) Update when developing Lummi Nation regulations to address consistency in regional water system design, planning, and expansion (WUCCC/EES 2000). Consistent with the Lummi Nation efforts to preclude attempts to exercise state jurisdiction on the federally reserved Lummi Indian Reservation, the Reservation is not included in the current WCCWSP. The Navajo Nation SDWA and Public Drinking Water Regulations have been obtained for consideration when drafting Lummi Nation laws and regulations (Navajo Nation 2001).

Primacy Requirement No. 2

The tribe must have adopted and implemented adequate procedures for the enforcement of the tribal regulations.

To meet this requirement the tribe must conduct or make arrangements with outside agencies for the following activities found in 40 CFR 142.10 (a-g):

- Maintain an inventory of public water systems, such as ownership and compliance information found in the State's Water Facility Inventory Forms and database.
- Implement a systematic program of conducting sanitary surveys, including an explanation for prioritizing various classes of public water systems. For the small number of systems on the Reservation, this could be a fairly simple task. Initially

during program development, it may be possible to arrange for Indian Health Service (IHS) to conduct the sanitary surveys. However, the EPA would prefer the Tribe to assume full responsibility for conducting sanitary surveys within a definite time period (EPA 1993).

- Identification of EPA or state certified laboratories available to a tribe that are capable of performing all of the analytical measurements of all contaminants specified in the drinking water regulations. While it is currently the responsibility of the public water system owners to submit water samples to a certified laboratory, a tribe may chose to take on this responsibility for the public water system operators. Regardless, the tribe must submit an explanation of the types of sampling it will conduct, such as sampling during sanitary surveys or public health emergencies, and a copy of the contract(s) with the certified laboratories.
- Review of plans and specifications for new or substantially modified public water system facilities to ensure they will be capable of compliance with the drinking water regulations. This review typically requires a licensed professional engineer. A tribe may have an agreement with the Indian Health Service (IHS) to perform this plan review, but EPA expects the tribe to develop the capacity to perform this function themselves or contract out the review (EPA 1993). The IHS does not currently review plans for water system improvements in the LTWD.
- Demonstrate that there is an independent tribal agency or organization that has the power to compel compliance with the Lummi Nation drinking water regulations. The tribal enforcement agency must be able to:

    1. Apply the tribal drinking water regulations to all public water systems in its jurisdiction, including Federal facilities, but not interstate carrier conveyances.
    2. Have the right of entry and inspection of public water systems, including the right to take water samples, whether or not there is evidence of a violation.
    3. Assess civil penalties of at least $1,000 per day for violations of public water systems serving more that 10,000 people and "adequate" penalties for systems serving less than 10,000 people.
    4. Sue in court to stop threatened or continuing violations and recover civil penalties.
    5. Require public water systems to keep and make available appropriate records, provide public notice of violations when mandated, and provide consumer confidence reports as required.
    6. Immediately restrain any person found engaging in an activity which endangers public health or environment as is relates to the PWSS and the UIC program (EPA 1993).

Tribes are *not* required to exercise criminal enforcement jurisdiction to meet the requirements of primacy as stated in 40 CFR 142.10 (g).

Primacy Requirement No. 3

The tribe has established and will maintain record keeping and reporting of activities under these programs and file necessary program reports with the EPA.

Compliance files for each public water system would include documents such as: water system designs, plans, and specifications; water quality history; sanitary survey reports; public notifications of violations; enforcement actions; correspondence; variances; and compliance schedules. The Handbook (EPA 1993) does not mention the issue of transferring existing water system files from the EPA or state primacy agent to a tribe, but presumably this would be addressed in transition discussions.

Primacy Requirement No. 4

The tribe can demonstrate that any variances or exemptions granted to small systems and others will be done in a manner that protects public health.

According to the Handbook, a variance generally may be granted when the raw water cannot reasonably meet the established Maximum Contaminant Levels (MCL) even after applying the best available treatment methods. Typically the variance includes a compliance agreement and schedule (EPA 1993). An exemption from compliance with MCLs may be granted if, due to compelling factors (including economic factors), the system was already in operation when the requirement took effect or a new system has no reasonable alternative source of supply, and granting the variance will not result in an unreasonable health risk (EPA 1993).

The granting of variance and exemptions demonstrates some of the required capabilities to obtain primacy including (EPA 1993):

- A thorough understanding of the provisions of the SDWA;
- An administrative agency with personnel capable of interpreting MCL requirements, system data, financial data, treatment techniques, and the costs of implementing treatment options; and
- A record keeping system that provides accurate data on raw water characteristics, sampling results, costs, revenues, compliance activities, and other relevant information.

Primacy Requirement No. 5

The tribe has adopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances such as floods and other natural disasters.

The Handbook states that demonstrating the ability to provide safe drinking water under emergency circumstances could be addressed by identifying alternate sources of safe drinking water such as bottled water or water from the nearest public water systems (EPA 1993). Individual public water systems, such as the Lummi Water District, could also be required to have their own or a more coordinated regional emergency drinking water plan.

3.3 UIC PROGRAM PRIMACY APPLICATION REQUIREMENTS

The requirements for tribal eligibility and application for determination of eligibility for a UIC program are found in 40 CFR144 Subpart H, and are the same as for the PWSS program. There are no completed cases of tribal primacy for a UIC program to examine. The Navajo Nation filed a separate UIC primacy application with the EPA in 2001, which is still pending. The Navajo Nation SDWA already includes UIC permit requirements in section 701. The tribal government for the Fort Peck Indian Reservation (Montana) is in the process of obtaining primacy for Class II injection wells.

The requirements for application for UIC program primacy are found in 40 CFR 145. All programs must meet the following general requirements:

- Have the legal authority to implement the provisions of regulations such as prohibition of unauthorized injection, elimination of Class IV wells, and conduct authorizations by rule and permit.
- Have compliance evaluation procedures such as receiving and investigating all reports submitted by permittees; the capacity to make comprehensive surveys and periodic inspections of all facilities subject to regulation; and the ability to investigate possible violations.
- Have adequate enforcement authority such as immediately restraining violators by order or suit in court; suing in court for continuing violations; and assessing and recovering civil penalties. To the extent that an Indian Tribe does not assert or is precluded from asserting criminal enforcement authority, the EPA Administrator will assume primary enforcement responsibility for criminal violations. The Memorandum of Agreement in 40 CFR 145.25 shall reflect a system where the Tribal agency will refer such violations to the Administrator in an appropriate and timely manner as stated in 40 CFR 145.13 (e).
- All information obtained or used in the program shall be available to the EPA upon request without restriction and any claims of confidentiality related to the information must be submitted to the EPA when providing the documents.

As described in 40 CFR 145.22, tribes must complete a "program submission" or application for primacy for a UIC program. The submission shall contain the following:

(1) A letter from the Governor of the State [Tribal Chairman] requesting program approval.

(2) A complete program description including: narrative description of program scope, organization and structure of tribal program administrative organization, staff, procedures, and compliance tracking and enforcement elements; itemization of estimated program costs and funding for the first two years; and copies of UIC well permit and application forms. The program description shall also include: schedule and prioritization of permitting existing injection wells if any; implementation of mechanical integrity testing requirements and frequency of testing; procedure for notifying operators of need to obtain permits; schedule for establishing and maintaining an injection well inventory; identification of USDWs and

exempt aquifers if any; and any plans to identify and delineate other sensitive ground water areas susceptible to contamination from Class V injection wells.

(3) A Reservation Attorney's statement as required by 40 CFR 145.24 that the laws of the tribe provide adequate authority to carry out the program described under 40 CFR 145.23 and the laws meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. Tribal statutes and regulations cited by the Reservation Attorney or independent legal counsel shall be in the form of lawfully adopted tribal statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the Tribal agency in court on all matters pertaining to the tribal program.

(4) A Memorandum of Agreement (MOA) with the EPA Regional Administrator as required by 40 CFR 145.25 that includes the following;

(a) Provisions and procedures for the transfer from the EPA to the tribe of pending permit applications and any other information relevant to the program.

(b) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the tribe will send to the EPA Regional Administrator for review, comment and, where applicable, objection.

(c) Provisions specifying the frequency and content of reports, documents, and other information which the tribe is required to submit to the EPA. Reports may be combined with grant reports where appropriate.

(d) Provisions for coordination of compliance monitoring and enforcement activities by the tribe and by the EPA.

(e) When appropriate, provisions for joint processing of permits by the tribe and the EPA.

Detailed program priorities and specific arrangements for EPA support of the tribal program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA.

(5) Copies of all applicable statutes and regulations, including those governing administrative procedures.

(6) The showing required by 40 CFR 145.31(b) of the tribe's public participation activities prior to program submission.

If a tribe can demonstrate to the EPA's satisfaction that there are no underground injections within the Reservation for one or more classes of injection wells (other than Class IV wells)

subject to the SDWA, and that such injections cannot legally occur on the Reservation until the tribe has developed an approved program for those classes of injections, the tribe need not submit a program to regulate those injections and a partial program may be approved. The demonstration of legal prohibition shall be made by either explicitly banning new injections of the class not covered by the tribal program or providing a certification from the Reservation Attorney that such new injections cannot legally occur until the tribe has developed an approved program for that class. The tribe shall submit a program to regulate both those classes of injections for which a demonstration is not made and class IV wells.

4. PRIMACY CONSIDERATIONS FOR THE LUMMI NATION

This section is also adapted from EPA's Indian Primacy Procedures Handbook (EPA 1993). The Handbook recommends that a tribe carefully consider many issues in the process of deciding to seek or not to seek primacy. The major issues include:

- How to best provide for safe drinking water and environmental protection;
- Impact on sovereignty and plans for self-governance, including job creation opportunities;
- Effect on Tribal government, administration, and organizations, including natural resources management and legal departments, as well as the Tribal water district;
- Availability of EPA and IHS assistance in the form of grants and technical assistance to develop and maintain primacy, as well as other fees or taxes to support the programs, and;
- Costs of primacy application, initial program development, and on-going program costs after primacy is achieved.

General considerations applicable to the Lummi Nation are presented in tables in this section.

4.1 PROVIDING SAFE DRINKING WATER AND ENVIRONMENTAL PROTECTION

Administration of the SDWA by the Lummi Nation may improve water quality at the tap. Table 2 lists considerations related to providing safe drinking water and environmental protection on the Lummi Reservation.

Table 2. Primacy: Providing Safe Drinking Water and Environmental Protection

Potential Advantages/Benefits	Potential Issues/Problems
Development and analysis of data from public water systems and injection wells could be useful for long term natural resource management decision making.	Cost of organizing and reviewing data from public water systems and injection well operators. Most, if not all, of the required water quality monitoring data for registered public water systems are already available to the public for non-commercial uses from DOH's SADIE database (www.doh.wa.gov/sadie/asp/default.asp) and/or from the EPA. Therefore, the Lummi Nation can access and analyze these data without primacy.
If Lummi Nation regulatory jurisdiction over non-tribal water systems is approved by the EPA, the Lummi Nation could have the ability to review and approve water system plans, expansions, and improvements which could provide additional tools for protecting the use of the ground water resources.	Administrative costs to perform these functions and legal costs if jurisdiction over non-tribal systems is challenged.

Table 2. Primacy: Providing Safe Drinking Water and Environmental Protection

Potential Advantages/Benefits	Potential Issues/Problems
Primacy for the UIC program could enhance Lummi Nation control and protection of ground water resources.	Administrative costs.
Local administration of the PWSS program could enhance effectiveness and timeliness of enforcement. Current EPA oversight is limited to the monitoring of systems' water quality compliance and other elements of the public water system regulations are not regularly monitored.	Administrative costs. Under primacy, the Lummi Nation would be required to implement and enforce all components of public water system supervision, such as plan review and certified operator requirements. There is currently no EPA water system plan or improvement construction plan review, although these plans are reviewed by the funding agency, such as U.S. Department of Agriculture Rural Development (Ballew 2004). The DOH or the WCHHSD currently reviews and must approve plans for non-tribal water system improvements.
Reservation water suppliers could produce better quality drinking water under the potentially enhanced effectiveness of Lummi Nation primacy, thus improving the health of all water users. This may be particularly possible for the Group B size domestic systems on tribal land that are not currently under SDWA regulation by any agency.	Because the water quality currently delivered to the tap by the registered public water systems on the Reservation meets all health standards, there is uncertainty that Lummi Nation primacy will improve water quality delivered to the tap. If the Lummi PWSS program is administered by a Lummi Department with funding sources separate from the LTWD, there should be no effect on LTWD infrastructure and expansion funding allocations.

4.2 EFFECT ON SOVEREIGNTY AND SELF-GOVERNANCE

Table 3 lists potential impacts, both beneficial and problematic, on Lummi Nation sovereignty and self-governance.

Table 3. Primacy: Effect on Sovereignty and Self-Governance

Potential Advantages/Benefits	Potential Issues/Problems
Establishment of Lummi Nation regulations on drinking water and underground injection wells.	Lummi Nation regulations must be as strict as or stricter than the EPA rules and be modified as the EPA regulations are changed.

Table 3. Primacy: Effect on Sovereignty and Self-Governance

Potential Advantages/Benefits	Potential Issues/Problems
Lummi Nation control of regulation enforcement.	The Lummi Nation must designate and fund an independent regulatory agency (independent from the tribal water district enterprises). Any potential overlapping interests between the LTWD and the enforcement agency must be resolved to the EPA's satisfaction.
Strengthening of Lummi Nation government and the ability of the tribal government to exercise civil jurisdiction over the action of tribal and non-tribal members who may violate tribal regulations.	In addition to existing procedures, the Lummi Nation must establish administrative procedures specific to the SDWA programs for civil enforcement against non-Indians. This may draw opposition from non-tribal members who live on the Reservation and potentially from state and county governments and result in legal challenges.
Enhanced recognition of Lummi Nation government and authority by non-tribal interests and governments. Primacy that included jurisdiction over non-tribal water systems could help ensure a safe reliable supply of drinking water which is fundamental to the political integrity, economic security, and health and welfare of the Lummi Nation.	Potential legal costs to ensure jurisdictional authority over fee lands and non-tribally owned public water systems.
A Lummi Nation program would limit state attempts to regulate and influence resource development decisions on the Reservation.	The current situation where there are conflicting environmental programs between the state and the Lummi Nation on adjacent land could continue to pose practical administrative problems and lack of uniformity.

Additional Discussion of Effect on Lummi Nation Sovereignty and Self-Governance

Regarding the establishment of a regulatory agency independent from any regulated water systems, the 53 FR 186, September 26, 1988 suggests the possible solutions of the development of a Tribal utility authority or an independent environmental commission. A review of the current Lummi Nation governmental structure suggests that since the LTWD is tied to the Lummi Planning Department, and since the Natural Resources Department already administers the Water Resources Protection Code (Title 17) administratively, this independent regulatory agency should be the Natural Resources Department.

The Lummi Tribal Sewer and Water Districts were formed in 1976 as a component unit of the Lummi Nation. The Sewer District is governed by a five-member board and provides sanitary services (wastewater collection and treatment) to users located on the Reservation. Two of the positions on the Sewer District's Board are open to non-tribal members. A three person board governs the Lummi Water District with two members elected and one member

appointed by the Lummi Indian Business Council (LIBC). The Boards select management staff, set user charges, control all general aspects of the District's management, and establish budgets subject to LIBC approval. The Districts also conduct construction activities funded primarily by federal agencies. All assets acquired by the Districts belong to the Lummi Nation and any land leases or bank loans must be approved by the LIBC.

4.3 EFFECT ON THE LUMMI NATION ADMINISTRATIVE AND ORGANIZATIONAL CAPABILITIES

Seeking and obtaining primacy will affect the Lummi Nation administrative and organizational capabilities. Table 4 summarizes issues to consider related to the Lummi Nation administrative and organizational capacities.

Table 4. Primacy: Effect on the Lummi Nation Administrative and Organizational Capabilities

Potential Advantages/Benefits	Potential Issues/Problems
Strengthening of Tribal government by developing additional regulatory enforcement capacity.	Possible regulator-regulatee conflicts.
Development and improvement of Lummi Nation administrative procedures.	Development of additional administrative structures and programs may pose both organizational and funding problems, especially for small tribes, such as the Lummi Nation.
Lummi Nation government would provide more direct services to Lummi Nation members.	Few Lummi Nation members other than LTWD staff or small water system operators would see the "more direct services" if oversight of public water systems was conducted by the Lummi Nation instead of EPA, DOH, or WCHHSD.
Better integration of Lummi Nation resource management functions.	
Further opportunities to integrate the Lummi Nation court system into dispute resolution regarding Lummi Nation resources.	Costs associated with regulatory actions may be prohibitive in some cases.
More opportunity for Lummi Nation Commissions to make decisions and develop policy regarding the regulation of the environment.	Commissions will have additional work load and administrative costs.
Enhance Lummi Nation code through development of additional environmental laws specifically designed to meet reservation needs.	Costs associated with regulatory actions may be prohibitive in some cases.

Table 4. Primacy: Effect on the Lummi Nation Administrative and Organizational Capabilities

Potential Advantages/Benefits	Potential Issues/Problems
Additional employment of Lummi Nation members in natural resource and water system management.	Additional technical, engineering, health, and legal staff or contracted services will be required to obtain and implement primacy. Costs of staff development and maintenance.

4.4 EFFECT ON EPA AND IHS ASSISTANCE

The EPA and IHS currently provide various forms of technical and financial assistance to the LTWD and LIBC departments. Relationships and memorandums of understanding may change under primacy. Table 5 summarizes the potential effects of primacy on EPA and IHS assistance.

Table 5. Primacy: Effect on EPA and IHS Assistance

Potential Advantages/Benefits	Potential Issues/Problems
Technical assistance for preparation of a development grant, development plan.	There may be limited EPA assistance available to the Lummi Nation due to budget and resource limitations (Nogi 2004).
Program Development Grant or GAP funds may be available.	The Lummi Nation must provide at least a 10% match (25% more likely) and in-kind services may be used.
Annual Performance Partnership Grants may be available for maintaining program.	The Lummi Nation will most likely expected to contribute at least 50% of the on-going costs.
EPA Region 10 provides technical and compliance assistance to the Lummi Nation water systems.	EPA Region 10's DI program would continue to provide technical and compliance assistance to the Lummi Nation, with or without Lummi Nation primacy (Paulsen 2004).
IHS technical assistance can be utilized to help develop primacy applications and programs.	The availability of IHS technical capability and assistance may not satisfy primacy requirements for in house staff expertise.
IHS may be able to assist the Lummi Nation in seeking matching funds for a Lummi Nation regulatory agency.	IHS funds cannot be used to support the Lummi Nation regulatory agency.
IHS will continue to provide technical assistance and funding for water system improvements after the Lummi Nation obtains primacy.	If the Lummi Nation adopts water system design regulations stricter than EPA's, the scope of IHS services may drop because of increased construction costs to meet the higher standards. Also, IHS may no longer be able to perform some activities that would now be deemed regulatory, such as plan reviews and sanitary surveys.

Additional Discussion on the Effect on EPA and IHS Assistance

The LTWD has a good relationship with IHS Sanitation Construction Division (Ballew 2004). During self-governance discussions, IHS agreed to continue to provide technical assistance to the Lummi Nation (Ballew 2004). Technical assistance has come recently in the form of operator training and education for certification tests and help in diagnosing infiltration problems in the sewer lines. Under self governance, the LTWD and the Lummi Planning Department administer the IHS Scattered Site funds applied for each year. These funds are typically used to connect residences to the LTWD and provide sanitation facilities. Lummi Water and Sewer Districts have also obtained funds awarded to systems ranked in the IHS/EPA Sanitary Deficiency System (SDS). It does not appear that access to Scattered Site and SDS funding would be affected by primacy. The IHS has conducted sanitary surveys, as recently as 2003, on the LTWD and it is possible that this IHS service would likely be curtailed since it is part of SDWA enforcement. The relationship between IHS and the Lummi Nation may come under review during primacy discussions. Roles and responsibilities will likely need to be clarified in a MOA.

Current EPA involvement with LTWD is in the form of compliance monitoring and informational letters, invitations to region training workshops, and individualized free assistance in completing a system monitoring plan (McCourt 2004). The EPA does not conduct plan review of LTWD improvements and construction projects. Plans drafted by engineers contracted by the LTWD are reviewed by the funding agency only, such as US Department of Agriculture Rural Development.

5. ESTIMATED PRIMACY PROGRAM COSTS, POTENTIAL FUNDING, AND RECOMMENDED ACTION PLAN

Lummi Nation PWSS and UIC primacy program development and implementation cost estimates and potential funding sources are described in this section along with recommended approaches that are elements of an action plan. The general steps to evaluate, seek, and obtain primacy for a PWSS program are the following:

1. Decide whether to pursue primacy and determine the scope of primacy.
2. If yes, obtain funding for primacy program development costs.
3. Develop a primacy program and begin implementation.
4. Apply to the EPA for primacy approval.
5. Obtain primacy and apply to the EPA for ongoing program implementation funds.

These steps are also displayed in Figure 2: Lummi Nation Primacy Program Process Flow Chart. Table 6 shows a generalized timeline for the Action Plan described above. The steps and timeline would be repeated or extended depending on whether the PWSS and UIC program primacy were pursued separately or together.

Table 6. Generalized Timeline of Potential Lummi Nation SDWA Primacy Process

2005	2006	2007	2008	2009
Lummi Nation makes decision to seek primacy.				
If yes, obtain funding for primacy program development grant.				
	Develop the Lummi Nation primacy programs, adopt regulations, and begin program implementation.			
			Apply to the EPA for primacy. Continue program implementation.	Apply for on-going primacy program grants from EPA. Implement fees. Continue program.

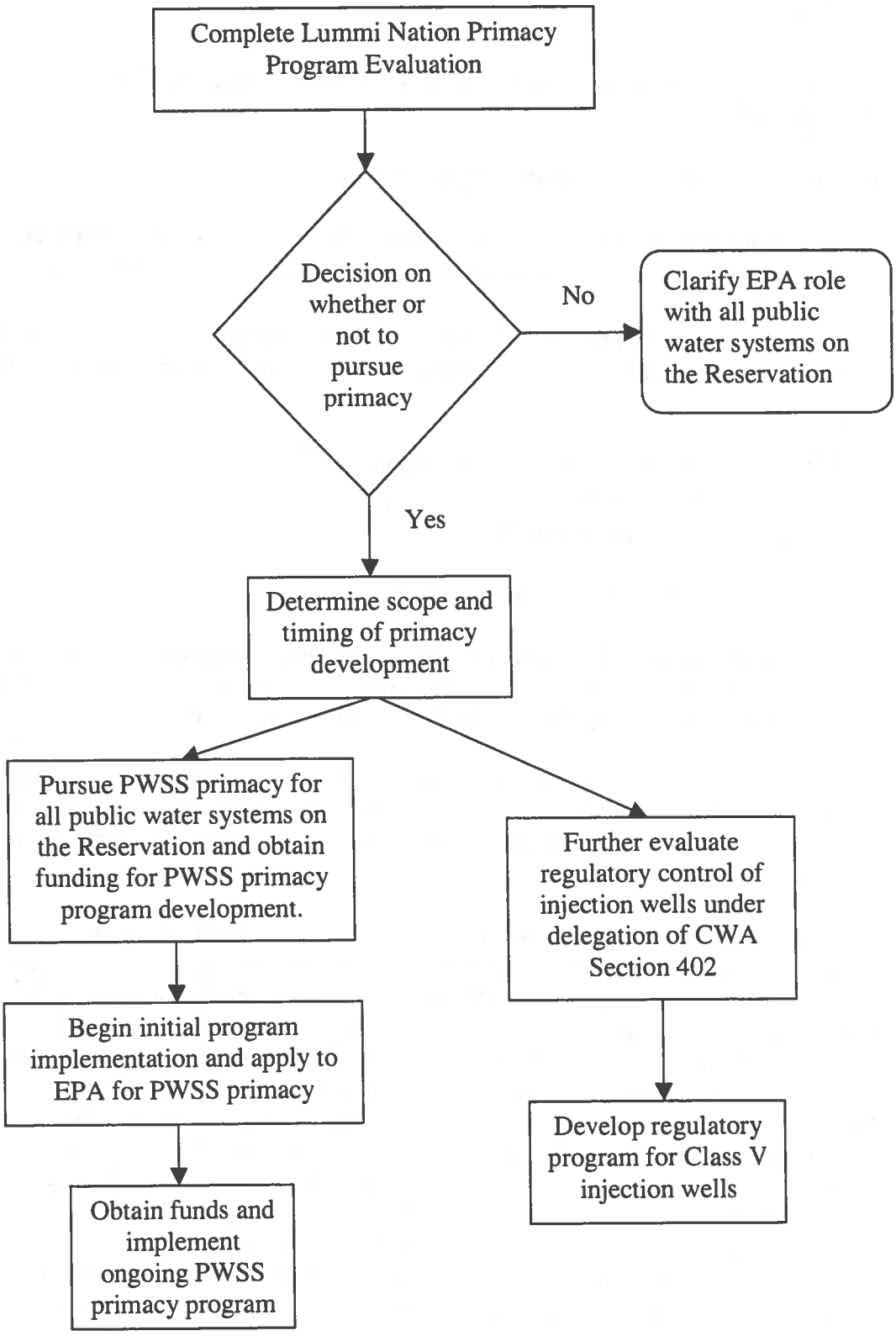

Figure 2: Lummi Nation Primacy Program Process Flow Chart

5.1 STEP 1: DETERMINE SCOPE OF PRIMACY AND DECIDE WHETHER TO PURSUE

Determine the scope of primacy desired by the Lummi Nation based on some combination of the options. For example:

Public Water System Supervision (PWSS) Program

- Group A systems (greater than 15 connections or 25 people) on trust land only;
- All Group A systems, including those owned and operated on fee land by non-tribal members;
- All Group A and Group B (less than 15 connections) systems on trust land; and
- All Group A and Group B (less than 15 connections) systems on trust land and fee land.

Underground Injection Control (UIC) Program

- All UIC well classes;
- UIC Class V injection wells only.

Consider the timing of filing of primacy applications:

- File PWSS and UIC primacy program applications together or separately;
- File for primacy for public water systems on trust lands first, followed later by a separate primacy application for non-tribal systems on fee lands.

Legal review of jurisdiction over non-tribal systems and UIC wells, the complexities of enforcement, and the potential for conflict of interest between the Lummi Nation regulatory agency and LTWD is recommended early in the process to help determine the scope of primacy.

The experience of the Navajo Nation in their pursuit and development of primacy may be useful to consider in making the decision regarding primacy. The Navajo Nation obtained primacy from EPA Region 9 for PWSS and filed a separate application for UIC program primacy in 2001. This is the first and currently only Indian nation to obtain SDWA primacy. The Navajo Nation is 25,000 square miles, spreading across northeastern Arizona, northwestern New Mexico, and southeastern Utah. Similar to the Lummi Reservation, the Navajo Nation consists of approximately 75 percent trust and 25 percent fee lands, although much of the fee land is owned by individual tribal members. The Navajo EPA (one of 16 divisions in the Navajo government executive branch) administers the Navajo Nation Primary Drinking Water Regulations (NNPDWR) adopted pursuant to the Navajo Nation Safe Drinking Water Act (NNSDWA), 22 N.N.C. § 2501 et. seq. The current Navajo Nation primacy agreement with the EPA covers 164 public water systems on trust land. Using precedents from the lawsuit *Montana v. United States* [2], the Navajo Nation is working on a new primacy application for additional public water systems on fee lands within the

[2] 450 U.S. 544, 101 S.Ct.1245, 67 L.E.D.2d 493.

reservation. Benefits considered by the Navajo Nation in seeking primacy included improving oversight of public water systems since EPA Region 9 office is in San Francisco; developing administrative capabilities; providing jobs; and supporting self-governance (Barney 2004).

Estimated Costs of Accomplishing Step 1: $10,000 (0.2 Full time equivalent (FTE)). Costs include contractor/staff report preparation and review, documentation of the staff recommendation, departmental and commission review and approval, and Lummi Indian Business Council (LIBC) approval of decision to pursue primacy.

Funding for Accomplishing Step 1: Existing or anticipated LIBC appropriations and/or grants.

Recommended approach: Consider filing PWSS and UIC primacy applications separately to potentially reduce complications. Include Group B systems in Lummi Nation regulations to better protect public health. Obtain legal opinion on potential success of including regulation of public water systems on fee land. Evaluate more closely 40 CFR 145.21 (d) and CWA Section 402 Lummi Nation primacy report due in 2005 before filing for UIC program primacy. As described in 40 CFR 145.21 (d):

> States [Tribes] which are authorized to administer the NPDES permit program under Section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State [Tribal] UIC program. Section 402(b)(1)(D) of CWA requires that NPDES States [Tribes] have the authority "to issue permits which control the disposal of pollutants into wells." In many instances, therefore, NPDES States [Tribes] will have existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA excludes certain types of well injections from the definition of "pollutant." If the State's [Tribe's] statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.

5.2 STEP 2: OBTAIN FUNDING FOR PWSS PRIMACY PROGRAM DEVELOPMENT

Primacy program development funding must be obtained to hire, contract, or re-designate staff to develop the program plan, draft regulations, seek regulation approval, and document administrative procedures.

5.2.1 Availability of EPA Primacy Program Development Grants

The paragraphs below summarize information found on the EPA website http://www.epa.gov/safewater/tribal/grants.html (EPA 2004b) and the memo "FY 2005 Grants to Support Public Water System Supervision Programs on Tribal Lands DRAFT Guidance" (Washington and Harrigan 2004) in Appendix A.

The EPA can reserve up to three percent of the national PWSS program grant funds to implement the PWSS program on tribal lands. The funds are available for three purposes: grants to a tribe that has received PWSS Primary Enforcement Authority (primacy grants); development grants to a tribe that is seeking primacy; and to assist the EPA's Regional offices in directly implementing the PWSS program on tribal lands. In FY1998, the EPA requested and received an increase in the PWSS appropriation, specifically to help tribes to build the capacity to eventually operate their own PWSS primacy programs. In 2001, the regulations were modified to increase the allowed tribal reserve from three percent to a maximum of seven percent. Primacy Program Development grants are usually provided for only three to four years.

5.2.1.1 Method of EPA Fund Allotment

Funds appropriated each year are allotted, by formula, on the basis of:

- Tribal population (20%) as contained in the most currently available Census Bureau information;
- Tribal land area (10%) as contained in the most currently available Census Bureau information;
- The number of community and non-transient non-community water systems located within tribal land area boundaries (56%); and
- The number of transient non-community water systems located within tribal land area boundaries (14%).

No Region's allotment shall be less than 95 percent of its prior year allotment.

5.2.1.2 EPA Proposed Allotments for FY2005

A total of $6,764,500 was tentatively available to support PWSS program activities on all tribal lands for FY2005 (October 1, 2004 through September 30, 2005). This amount was 6.436% of the total FY05 PWSS budget request of $105,100,000. The Region 10 proposed target allotments for FY2005 are detailed in Table 7:

Table 7. EPA Region 10 Proposed Tribal Allotments for FY2005 (Washington and Harrigan 2004)

Regional Direct Implementation	Operator Certification	PWSS Program Capacity Development	Source Water Protection Program	Drinking Water Infrastructure Tribal Set Aside	Regional Total
$397,700	$95,300	$91,800	$91,800	$110,200	$781,300

At the end of November 2004, final figures were not available from the EPA and the full proposal was not expected to be received (Nogi 2004). The primacy development grant amount potentially allotted to the Lummi Nation would be negotiated by EPA Headquarters, EPA Region 10, and the Lummi Nation (Nogi 2004).

5.2.1.3 Matching Funds Required for EPA Grants

According to the Handbook (EPA 1993), a tribe will generally be required to provide at least 10-25 percent of the program development or on-going program implementation costs. The match can be 100 percent in-kind funds and can include some types of Federal fund sources such as the Indian Sanitation Facilities Act PL86-121 and Indian Self Determination Act, PL 93-638. The IHS and BIA funding to the LTWD cannot be used for matching funds. Regardless of the required matching level, the actual percentage of program costs that may be incurred by a given Tribe in the course of adequately administering these programs could easily exceed the 25 percent matching requirements. In the early 1990's States contributed 53 percent of their program costs on average, while EPA contributed 47 percent (EPA 1993).

Estimated Costs of Accomplishing Step 2: $10,000 (0.2 FTE)

Funding to Accomplish Step 2: Existing or anticipated LIBC appropriations and/or grants.

Recommended Approach: Apply for EPA primacy program development funds to secure a new source of funding. Less desirable funding sources are the General Assistance Program (GAP). The amount of funding from GAP to the Lummi Nation varies each year, with typically a base funding allocation of $110,000 and then an opportunity to submit work plans for additional un-met environmental program needs. During FY03, which funds activities during 2004, the Lummi Nation Performance Partnership Grant (PPG) was $355,634 of which $215,634 was from the GAP program. For FY04, which will fund activities during calendar year 2005, the PPG is $455,141 of which $275,000 was from the GAP. The GAP funding could be used for development of SDWA primacy program (if considered an "environmental protection" program). However, it would be preferable to use SDWA primacy program funds in order to establish a new funding source. Suggested grant goals for the expected three year program development period are presented in Appendix C.

5.3 STEP 3A: DEVELOPMENT AND INITIAL IMPLEMENTATION OF LUMMI NATION PWSS PRIMACY PROGRAM

Staffing and cost information from programs serving a much larger geographic scale than that of the Lummi Nation are provided below for general consideration and comparison. Table 8 shows the type and number of staff and number of public water systems administered by these three larger programs.

The DOH engineer annual salaries for those who review water system designs and construction reports, and salaries for other drinking water program technical staff, are listed below from the State Department of Personnel (State of Washington Department of Personnel 2001):

DOH Environmental Engineer 2-	$53,146- $55,836
DOH Environmental Engineer 3-	$61,632- $64,776

Typical contracted professional engineering rates for the Lummi Nation are estimated at $100 per hour for work such as project plan review.

DOH Staff dealing with water quality monitoring (coliform bacteria, source water quality parameters) are typically in the Public Health Advisor 3 (PHA 3) classification with the annual salaries below:

Public Health Advisor 2-	$49,380- $51,864
Public Health Advisor 3-	$51,864- $54,480

Table 8. Large Scale PWSS Program Staff and Number of Public Water Systems (Barney 2004, Woolrich 2004, Chudek 2004)

Primacy Agent	Number of Public Water Systems	Managers	Professional Engineers or Engineers in Training	Environmental Specialists and Public Health Advisors	Other Staff	Support Staff
Navajo Nation EPA	164-250 Group A	1	3	3	1 hydrologist	2
DOH Northwest Regional Office[1]	1404 Group A	2	7	6	1 compliance manager, 1 planner	4
Whatcom County Health and Human Services Department	196 Group B	Portion of an FTE	None	1.3	None	Portion of an FTE

[1]Does not include support such as database and enforcement support and administration provided by the DOH Olympia office. Some staff time is spent with Group B water systems and/or county health departments who administer Group B systems which are not covered by SDWA.

Other DOH PWSS program tasks are performed by Environmental Specialists who receive salaries listed below:

DOH Environmental Specialist 2-	$38,580- $40,512
DOH Environmental Specialist 3-	$44,724- $46,992
DOH Environmental Specialist 4-	$51,864- $54,480

A draft agreement that the WCHHSD is currently negotiating with DOH includes the potential costs of conducting sanitary surveys (DOH/WCHHSD 2004). The DOH has a Qualified Sanitary Surveyor Contractor Program. In the draft agreement, the DOH will pay a maximum reimbursement of $500 per system including all fees such as travel, lodging, and per diem for each sanitary survey performed. The proposed agreement also addresses technical assistance. The DOH will pay $500 maximum per system for special purpose investigations, treatment/flushing assistance, and follow up visits. Completing Small Water

System Management Plans, assisting with Red/Blue Systems Source Susceptibility Assessments, and assisting in Endangered Species Act submittals is compensated at $750 maximum per system. The DOH also provides $36,850 annually to WCHHSD based on a Joint Plan of Operation, 2002- 2007 (DOH/WCHHSD 2002). The WCHHSD estimates it has 1.3 FTE's working with public water system issues and Food and Water Program Supervisor Paul Chudek indicated that these funds do not cover all public water system program costs (Chudek 2004).

The Navajo Nation EPA received between $100,000 and $350,000 annually from EPA Region 9 during the program development and primacy application phases. The EPA Region 9 primacy program implementation grant to the Navajo Nation for 2004 is $427,400 with a 25 percent Navajo Nation match (Barney 2004).

Estimated Costs for Accomplishing Step 3A: It is estimated that a Lummi Nation PWSS program would require 0.35 FTE for program development and initial implementation and 200 hours of contracted engineering services per year for a total of approximately $40,000 per year.

Funding for Accomplishing Step 3A: EPA Primacy Program Development Grant or GAP funds described in Step 2 Recommended Approach.

5.4 STEP 3B: DEVELOPMENT AND INITIAL IMPLEMENTATION OF THE LUMMI NATION UIC PRIMACY PROGRAM

The EPA and Ecology program staff and budgets for much larger scale programs are described below for general consideration and comparison.

EPA Region 10 UIC Program

Staff for the EPA Region 10 UIC Program consists of (Slate 2004):

- Approximately 1 FTE for Class V injection well inventory for all tribes
- Approximately 1 FTE for state primacy oversight
- Approximately 1 FTE for Alaska Class I,II, and III injection wells

Minimum staff educational requirements are a Bachelor of Science (B.S.) degree and most are registered Geologists or Hydrogeologists (Slate 2004). In fiscal year 2004, EPA Region 10 was allocated $76,155 in federal funds for the tribal UIC program to be used for Class V Implementation, including Class V inventories, or UIC Primacy grants when necessary, unless a clear rationale exists to apply it to other classes (EPA 2004a).

Ecology UIC program

Ecology has approximately 1 to 1.5 FTE working in the state UIC program. The Program Manager has a B.S. in Geology and is classified as a hydrogeologist (Swenson 2004). The Program Manager works part time (0.6 FTE) on compliance issues and is currently updating

the state rule language. The Ecology UIC program also has a database steward who does not spend more than 0.1 to 0.2 FTE of their time maintaining the database. Regional inspectors total 0.2 FTE, but they do not solely inspect UIC wells. The inspections are in conjunction with a NPDES storm water inspection or possibly a complaint. Ecology spends approximately $120,000 on the UIC program statewide according to the 2003-2005 budget. Ecology currently has approximately 15,000 injection wells registered in an Access database, but acknowledge there are many more injection wells in the state (Swenson 2004).

Estimated Costs of Accomplishing Step 3B: $6,000 (0.05) FTE

Funding to Accomplish Step 3B: An EPA UIC Primacy Program Development grant is unlikely (Slate 2004). GAP funds described in Recommended Approach for Step 2 could be used for UIC program development only and cannot be used for implementation, except for solid waste programs.

Recommended Approach: Considering that there are currently no injection wells on the Lummi Reservation that require an UIC permit (plans for one UIC permit are pending for 2004-2005) and because the geologic conditions on the Reservation make it unlikely that there will be any wells subject to UIC permits other than Class V wells, seeking primacy for the UIC program should be a lower priority than seeking PWSS program primacy. However, the relatively low cost of the program and the associated incremental step toward achieving tribal self-governance goals suggests that seeking UIC program primacy should be further evaluated as part of an NPDES program (delegation of Section 402 CWA) evaluation report scheduled for 2005.

5.5 STEP 4: APPLY FOR PWSS PROGRAM PRIMACY WHILE CONTINUING PROGRAM IMPLEMENTATION

The process of applying for primacy and continuing to implement the initial program is estimated to require 0.35 FTE. There will also be substantial legal review and support staff time required to prepare and submit the application and negotiate with EPA for approval of the program.

Estimated Costs of Accomplishing Step 4: $40,000

Funding to Accomplish Step 4: EPA PWSS Primacy Program Development grant or GAP funds described in Step 2 Recommended Approach.

Recommended Approach: Complete and submit PWSS primacy application to EPA.

5.6 STEP 5: APPLY FOR ON-GOING PWSS PRIMACY PROGRAM IMPLEMENTATION FUNDS, IMPLEMENT FEES, AND CONTINUE PROGRAM

The EPA has potential funds for on-going primacy program implementation grants as described in Step 2. The EPA Region 10 allotment has not been confirmed for FY 2005

(Nogi 2004). Grant amounts would be negotiated between EPA Headquarters, EPA Region 10, and the Lummi Nation (Nogi 2004).

The DOH PWSS funding system is described for general consideration and comparison. The DOH expects to receive $5,940,225 of Public Water System Supervision (PWSS) funding for the July 1, 2003 to September 30, 2005 period covered by the current State/EPA Agreement (Woolrich 2004). The portion allotted to the NWRO office is difficult to extract and was not provided by the DOH.

In addition to EPA funding, DOH charges fees for water system evaluations, project review and approval, monitoring waivers, and operator certification fees in WAC 246-290-990 and WAC 246-292-160 in Appendix B and C. Annual system operating permit fees are found in WAC 246-294-070 and summarized in Table 9.

Table 9. DOH Group A Operating Permit Fees

Classification	Fee
0 – 14 services	None
15 – 49 services	$25 per year
50 – 3,333 services	$1.50 per service per year
3,334 – 53,333 services	$4,999.50 + .10 per service over 3,333 services per year
53,334 or more services	$10,000 per year
Satellite System Management Agency (SMA) (based on total services in all systems owned by SMA)	$1 per service per year or the fee from the appropriate category above, whichever is less
New Group A water system	One-time charge of $5 per service
Late charge	Additional 10% of applicable charge stated above or $25, whichever is greater

Estimated Costs of Accomplishing Step 5: $6,000 (0.05) FTE

Funding to Accomplish Step 5: Grants obtained in earlier steps.

Recommended Approach: EPA grants should be pursued initially to fund the PWSS program implementation. As the program evolves, public water system annual operating permit and other fees should be considered to pay for all or a portion of the program cost, similar to the DOH operating permit and other fees described above.

6. SUMMARY AND CONCLUSIONS

This report provides a framework for making a decision on pursuing primacy and an action plan for proceeding if desired by Lummi Nation decision makers. The benefits of the Lummi Nation seeking and obtaining primacy for elements of the SDWA are difficult to quantify, but include potentially improving the long term reliability and quality of drinking water for all users on the Reservation and enhancing ground water protection which are the responsibility of the LIBC as the governing entity on the Reservation. The costs of evaluating, applying for, and initially implementing PWSS and UIC primacy are summarized in Table 10. It is difficult to estimate costs associated with complex legal challenges or political struggles with those who oppose tribal primacy. Once primacy is obtained, there must be a commitment to provide ongoing funding or primacy can be withdrawn and administration will revert to the EPA. The EPA funding availability is difficult to estimate when federal budgets have not been resolved for 2005 and are unknown for future years (Nogi 2004). Lummi Nation matching funds must also be provided for EPA grants.

Table 10. Primacy Program Cost Summary by Step

Step	Description	Estimated Cost
Year One		
Step 1	Primacy process evaluation and decision whether to pursue primacy	$ 10,000
Step 2	Obtain primacy program development funding	$ 10,000
Step 3A	PWSS primacy program development and initial implementation	$ 40,000
Step 3B	UIC primacy program development and initial implementation	$ 6,000
Year Two and Three		
Step 4	Complete PWSS primacy application to the EPA and continue implementation	$ 40,000 per year
Step 5	Apply for ongoing PWSS primacy program implementation funds	$ 6,000

A summary of the potential benefits and issues/problems along with a qualitative rating of positive, neutral, or negative is shown in Table 11.

Table 11. Summary and Rating of Primacy Benefits and Issues/Problems

Issues	Benefits	Issues/Problems	Rating	Overall Rating
Safe water and environmental protection	Opportunity to organize and analyze water use and water quality data	Administrative costs	Positive	Positive
	Enhanced enforcement due to local control	Administrative costs	Positive	

Table 11. Summary and Rating of Primacy Benefits and Issues/Problems

Issues	Benefits	Issues/Problems	Rating	Overall Rating
	Potential for improved drinking water quality for systems not currently regulated	Uncertainty of improvement and administrative costs	Positive	
	Ground water quality protection	Administrative costs	Neutral	
Effect on sovereignty and self-governance	Development of Lummi Nation codes and regulations and enforcement agency	Administrative costs	Positive	Positive
	Opportunity to exercise jurisdiction over non-tribal water systems	Legal and administrative costs	Positive	
	Limit state attempts to regulate and influence water resource decisions on the reservation	Conflicting regulations on adjacent land	Positive	
Effect on Lummi Nation administrative and organizational capabilities	Expansion of Lummi Nation government, administrative procedures, and tribal court functions.	Administrative costs and potential regulator-regulatee conflicts.	Positive	Positive
	Better integration of Lummi Nation resource management functions.	None identified.	Positive	
	Enhanced Lummi Nation Code of environmental laws designed to meet reservation needs.	Delayed public support unless public education program is conducted	Positive	
	Additional employment opportunities for Lummi Nation members in water resource management.	Staff or contractor recruitment and development costs.	Positive	
Effect on EPA and IHS Assistance	Continued EPA technical assistance to LTWD and potentially new assistance for program development and primacy application process.	None identified.	Positive	Positive

Table 11. Summary and Rating of Primacy Benefits and Issues/Problems

Issues	Benefits	Issues/Problems	Rating	Overall Rating
	Continued IHS technical assistance and funding.	None identified.	Positive	

Based on this evaluation, it is recommended that the Lummi Nation:

1. Pursue SDWA primacy for the PWSS program over the next five years at an estimated cost of $106,000.

2. Complete the planned evaluation of seeking authority to administer Section 402 of the CWA during 2005 and, following this evaluation, make a determination on whether or not to seek primacy for the UIC program.

Grant funding from the EPA should be secured to develop the Lummi Nation primacy programs, adopt regulations, and to begin program implementation.

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APPENDIX A- MEMO FY 2005 Grants to Support Public Water System Supervision Programs on Tribal Lands DRAFT Guidance

MEMORANDUM

SUBJECT: FY2005 Grants to Support Public Water System Supervision Programs on Tribal Lands – DRAFT Guidance

FROM: Evelyn Washington, Chief Protection Branch, DWPD, OGWDW
Joan Harrigan-Farrelly, Chief Prevention Branch, DWPD, OGWDW

TO: Regional Drinking Water Program Managers Regions I, II, and IV - X

Attached for your information and use are proposed guidance and the tentative allotments for the FY2005 Grants to Support Public Water System Supervision Programs on Tribal Lands. The President's budget request was $105,100,000 for the entire PWSS program. We would reserve $6,764,500 of this amount for grants to support PWSS program activities on Tribal Lands. This memorandum proposes direction for the use of these funds and addresses:

- the total amount of FY2005 PWSS Grant funds that would be available to support the PWSS program on Tribal Lands;
- the individual Tribal PWSS primacy, primacy development, and other program development grants such as *Direct Implementation Tribal Cooperative Agreements* (DITCAs) to be set aside for FY2005;
- the program areas identified as priorities for the Tribal support program for FY2005;
- the allotment targets for each of the identified program priorities; and
- other information, authorities, or limitations specific to FY2005.

Please provide any comments and suggestions about the draft guidance to Rick Naylor by July 5, 2004. If you have any questions, please call Rick at 202-564-3847.

Attachment

FY2005 Annual Guidance for EPA's Grants to Support Public Water System Supervision Programs on Tribal Lands
DRAFT

A. Amount of Funds Reserved:

Based on the President's FY2005 budget request of $105,100,000 for the PWSS Grant Program, we will reserve a total of $6,764,500 for the PW SS Tribal Support Program. The reserve is 6.436% of the total amount available for the PWSS program -- the same percentage as has been set-aside for the past several years.

B. PWSS Primacy, Primacy development, and other program development grants to be set aside for the year

From the $6,764,500 we will allocate:

- $465,100 to Region 9 for the Navajo Nation's Primacy grant;
- $80,000 to Region 8 for a *Direct Implementation Tribal Cooperative Agreement* (DITCA) to the Standing Rock Sioux Tribe; and
- $100,000 to Region 10 to support the Region's Alaska Native Village program.

C. Contingency Funds or Projects of National Scope to be Managed at HQ

We plan on distributing the entire FY2005 tribal reserve to the Regional offices. Approximately $240,000 of PWSS Tribal support funds that had been reserved a few years ago for Tribal PWSS Primacy Workshops is still available, and will likely not be used for the workshops. This surplus can serve as a contingency fund for FY2005.

In addition, in FY2005 there will be $500,000 that will be granted to selected Tribal Operator Certification providers to start new or amend existing certification programs. The request for applications will be published in the *Federal Register* by the end of FY2004, and HQ will establish a review panel with interested Regions to make award decisions. Each Region would manage the operator certification provider grant within their area, and HQ would manage any national provider grants that get awarded.

D. Program Priority Areas for FY2005

For FY2005 we have identified the same program areas that have been the priorities for the past few years. They are:

- Tribal PWSS Program Capacity Development,
- Tribal Operator Certification Program support,
- Tribal Source Water Protection Program support,
- Assistance to the Tribes in administration of the Drinking Water Infrastructure Grants - Tribal Set-Aside Program (DWIGTSA), and
- Support for Regional Direct Implementation Programs

Although these are the nationally identified priority areas for FY2005, each Region has the authority to direct a portion of the Tribal PWSS program grant allotment that it receives toward other PWSS program Tribal activities, if the Region believes that is appropriate for its Tribal program needs. *(As in the past, funds must be used for PWSS program Tribal activities. Using funds for non-PWSS program Tribal activities will result in a decrease in the Region's PWSS program Tribal allotment in a subsequent program year.)*

In addition to these historical program priority areas, you need to ensure that any use of the funds, including any program plans and grant agreements made between the Region and the Tribes are directed toward achieving the public health objective presented in EPA's *Strategic Plan for 2003-2008* http://www.epa.gov/ocfo/plan/2003sp.pdf and the Office of Water's final *National Program Guidance* http://www.epa.gov/water/waterplan/#guidance. The National Program Guidance is being issued in concert with Goal 2 of the Strategic Plan, and the subsequent subobjectives, strategic targets, and performance activity measures. The PWSS Program strategic targets (related to Tribes) for FY2005 are

- 90% of the population served by community water systems in Indian country will receive drinking water that meets all applicable health-based drinking water standards;
- Number of households on Tribal lands lacking access to safe drinking water (reduced by 50% by 2015. There is no FY2005 Draft Target)

And the PWSS program activity (related to Tribes) for FY2005 is:

- Beginning in December 2004, 80% of all Tribal community water systems will have undergone a sanitary survey within the past 3 years. *(By FY2008 the goal is 100% of all Tribal community water systems.)*

While we recognize the need to provide flexibility to Regions and Tribes, we believe that all Tribal and Regional DI Programs should be focused on ensuring that the gains of the previous years' efforts are preserved and built upon. The overall objective of the PWSS program grant is to protect public health by ensuring that:

- drinking water systems, of all types, and of all sizes, that are currently in compliance, remain in compliance;
- drinking water systems, of all types, and of all sizes, that are not currently in compliance, achieve compliance;
- drinking water systems, of all types, and of all sizes, are preparing to comply with the new drinking water regulations that will be taking effect in FY 2005.

Also, even though we have made progress toward improving the national drinking water data quality, we still have significant work to do in this area. Improving data quality should be an integral component of any project or activity funded with PWSS Tribal support money, and Regions can also designate a portion of their PWSS grant for data management to ensure that data quality and other data problems are being addressed by Tribal and Regional DI programs. Specifically that:

- Tribal water system compliance determinations are consistent with the Federal regulations; and
- the required Tribal water system inventory, compliance, and enforcement data being provided to EPA HQ is accurate and complete.

E. Program Area Allotment Targets for FY2005

The national and Regional proposed target allotments for FY2005 are:

	Direct Impl	Operator Cert	1420 Cap Dev	1453 SWAP	DWIG TSA	Regional Totals *
1	$60,600	$18,600	$18,600	$18,600	$6,400	**$122,800**
2	$60,600	$18,600	$18,600	$18,600	$6,500	**$122,800**
4	$128,200	$36,800	$36,100	$36,100	$10,300	**$246,700**
5	$391,800	$96,600	$94,400	$94,400	$17,900	**$694,800**

6	$335,800	$104,200	$109,600	$109,600	$26,200	**$685,700**
7	$60,600	$18,600	$18,600	$18,600	$7,100	**$123,700**
8	$584,800	$139,200	$134,600	$134,600	$25,100	**$1,026,500**
9	$1,009,300	$402,100	$407,700	$407,700	$90,300	**$2,315,100**
10	$397,700	$95,300	$91,800	$91,800	$110,200	**$781,300**

Note - the Regional totals shown here do not include the Primacy, DITCA, and ANV support described in Section B.

F. Allotment Formulae:

As was done in FY2004, the Regional allotment targets for each of the five program priority areas were calculated using slightly modified versions of the three formulae contained in the May 28, 2002 general Tribal program grant guidance. The modifications consist of the incorporation of a "safety-net" similar to that used in the formula which calculates the PWSS State Grant Allotments. The safety-net assures that no Region's formula allotment will be less than 95% of its prior year allotment. This provision was added to the PWSS State Allotment formula several years ago in an effort to ensure some stability in each State's allotment from year to year, regardless of changes in a State's population or the number of public water systems that it regulates. We believe that stability is just as critical in the Regions' PWSS Tribal Program and have added the "safety-net" to the each of the Tribal program formulae.

G. Allotment Formulae Factors

Five categories of data, or factors, are used in the formulae that allot the Direct Implementation, Operator Certification support, Capacity Development support, and Source Water Assessment support funds among the Regional offices. Those factors are:

- the number of Indian Land community water systems (for which the Region is the

Primacy Agent)

- the number of Indian Land nontransient noncommunity water systems (for which the Region is the Primacy Agent)
- the number of Indian Land transient noncommunity water systems (for which the Region is the Primacy Agent)
- the Indian Land population within the Region, and
- the Indian Land geographical area within the Region.

The numbers of public water systems have been, and will continue to be, obtained from, SDWIS/FED. The information on populations and geographical areas comes from the US Census Bureau via the "*Census 2000*". Until a more current set of data becomes available, we will use the *Census 2000* as the source of the population and geographical data in calculating the PWSS Tribal Program grant allotments.

H. Authorities and Limitations for FY2005

1. Generic -- *(restated from the May 28, 2002 General Guidance)*

- All of the PWSS Tribal funds must be used to support the Region's Tribal PWSS Program. Funds may not be used for any non-tribal project or activity.
- Funds allotted to Regions in response to their requests for tribal Primacy (Navajo), Primacy development (Region 8), and Alaska Native Village support (Region 10) must be used for the requested purposes, or must be reprogrammed to Headquarters for redistribution among all Regions.
- Regions may not supplement their Tribal direct implementation program allotment with funds targeted for any of the other program area allotments. Regions may, however, use allotments targeted for their direct implementation program to support work in any of the other priority areas.

2. FY2005 Specific

- Regions are asked to contact the Office of Ground Water and Drinking Water before any funds targeted for SWAP are used for other purposes. Please remember that all source water assessments are to be completed before other program areas are considered. If assessments for Tribes are complete, Regions should use the SWAP funds to work with Tribes to develop and implement source water protection strategies to minimize the risks posed by the sources of contamination found in the assessments. The current OGWDW contact for Tribal SWAP activities is Jori Copeland (202 564-3876).

APPENDIX B- Fee Tables from WAC 246-290-990 and WAC 246-292-160

Water System Plans		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
Water system plan (New and Updated)	$134	$475	$1,167	$2,206	$3,584	$5,305
Minor water system plan alteration	$30	$112	$284	$547	$889	$1,305

Project Reports		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
All types of filtration or other complex treatment processes	$337	$687	$1,067	$1,546	$2,132	$2,827
Chemical addition only, such as ion exchange, hypochlorination, or fluoridation	$99	$199	$337	$508	$719	$962
Complete water system (an additional fee shall be assessed for review of treatment facility, if any)	$199	$475	$753	$1,100	$1,513	$1,994
System modifications requiring a detailed evaluation to determine whether the system, as modified, will comply with regulations (an additional fee shall be assessed for review of treatment facility, if any)	$134	$337	$547	$824	$1,167	$1,573

Special Projects		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
All types of filtration or other complex treatment processes	$337	$687	$1,067	$1,546	$2,132	$2,827
Chemical addition only, such as ion exchange, chlorination, or fluoridation	$99	$199	$337	$508	$719	$962
Complete new water system except treatment (an additional fee shall be assessed for review of treatment facility, if any)	$272	$613	$889	$1,238	$1,654	$2,132
New source only (an additional fee shall be assessed for review of treatment facility, if any)	$199	$370	$508	$687	$889	$1,134
One or more of the following submitted as a package and not requiring a detailed evaluation as determined by the department: Water line installation, booster pump station, modifications to source pumping, piping-valving, controls or storage reservoir (an additional fee shall be assessed for review of treatment facility, if any)	$134	$234	$370	$547	$753	$994
Documents submitted for projects such as water line installation, booster pump stations, modifications to source pumping, piping/valving, controls or storage reservoirs as determined by the department where such projects: Comply with design standards established by the department; Are prepared by a professional engineer in	$62	$115	$192	$272	$377	$496

accordance with WAC 246-290-040; and do not require a detailed evaluation by the department.						

Existing System Approval		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
NONEXPANDING system not requiring a detailed evaluation by the department	$260	$522	$785	$1,048	$1,311	$1,573
NONEXPANDING system requiring a detailed evaluation as determined by the department	$391	$785	$1,189	$1,573	$1,968	$2,362
EXPANDING system not requiring a detailed evaluation by the department	$522	$1,048	$1,573	$2,099	$2,626	$3,150
EXPANDING system requiring a detailed evaluation as determined by the department	$654	$1,311	$1,968	$2,626	$3,281	$3,939

Monitoring Waivers		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
Inorganic chemical monitoring waiver	Not applicable	$86 per source	$119 per source	$150 per source	$182 per source	$214 per source
Organic chemical monitoring waiver	Not applicable	$156 per source	$219 per source	$285 per source	$348 per source	$412 per source
Use waiver	Not applicable	$187 per source	$252 per source	$324 per source	$380 per source	$444 per source
Area wide waiver renewal	Not applicable	$187 per source	$233 per source	$278 per source	$324 per source	$357 per source
Inorganic chemical monitoring waiver renewal	Not applicable	$47 per source	$60 per source	$73 per source	$86 per source	$99 per source

Organic chemical monitoring waiver renewal	Not applicable	$92 per source	$131 per source	$171 per source	$208 per source	$246 per source
Use waiver renewal	Not applicable	$131 per source	$176 per source	$219 per source	$265 per source	$310 per source
Coliform monitoring waiver including departmental inspection requested by purveyor	Not applicable	$401	$496	$631	$803	Not applicable
Coliform monitoring waiver with third-party inspection report	Not applicable	$124	$124	$124	$124	Not applicable

Other		Group A				
Project Type	Group B	<100 Services	100 to 500 Services	501 to 999 Services	1,000 to 9,999 Services	10,000 or more Services
Well-site evaluation and approval including the site inspection and hydrogeologic information review.	$199	$299	$352	$437	$547	$687
Regulatory monitoring plan[1]	No plan required	$192	$260	$326	$391	$456
Unfiltered system annual comprehensive report	Not applicable	$391	$654	$917	$1,179	$1,441
Water system compliance report	$112	$112	$112	$112	$112	$112

APPENDIX C – Suggested PWSS Primacy Development Grant Goals

Suggested program development grant goals are found in the "Indian Primacy Procedures Handbook: Public Water System Supervision and Underground Injection Control Programs" (EPA 1993, p.49)

A. Suggested Year 1 Goals

- Technical and legal staff hired or contracted as needed
- Resolution of any regulator of regulate conflicts
- Signed Drinking Water Statue for PWSS
- Lummi Nation Code approved at least as stringent as federal regulations and ensure public participation
- Public notification procedures developed
- Sanitary survey protocols and procedures developed
- Data processing and record keeping procedures established

B. Suggested Year 2 Goals

- Evaluate accomplishments of previous year
- Memorandum of Understanding (including referral of criminal matters as necessary) developed with EPA
- Laboratory analytical requirements addressed
- Quality assurance plan developed and approved
- Variance and exemption policies defined
- Compliance tracking system developed
- Statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's jurisdictional assertion

C. Suggested Year 3 Goals (if necessary)

- Evaluate accomplishments of previous year
- Demonstrate capability to administer the program effectively.

APPENDIX D- List of Statutes and Regulations Referenced

Federal Statutes

Federal Safe Drinking Water Act of 1974, Public Law 93-523
Federal Safe Drinking Water Act Amendments of 1986, Public Law 99-339
Federal Safe Drinking Water Act Amendments of 1996, Public Law 104-182

42 U.S.C. Part A 300f - Definitions
42 U.S.C. Part B 300g - Public Water Systems
42 U.S.C. Part C 300h - Protection of Underground Sources of Drinking Water
42 U.S.C. Part D 300i - Emergency Powers
42 U.S.C. Part E 300j - General Provisions

Federal Register

53 FR 186, September 26, 1988
59 FR 64339, December 14, 1994

Federal Regulations

40 CFR Part 35 - State and Local Assistance
40 CFR Part 124 - Procedure for Decision Making (permits)
40 CFR Part 141- National Primary Drinking Water Regulations
40 CFR Part 142 - National Primary Drinking Water Regulations Implementation
40 CFR Part 143 - National Secondary Drinking Water Regulations
40 CFR Part 144 – Underground Injection Control Program (UIC)
40 CFR Part 145 - State UIC Program Requirements
40 CFR Part 146 - Underground Injection Control Program (UIC): Criteria and Standards
40 CFR Part 147 - State Underground Injection Control Programs.
40 CFR Part 148 - Hazardous Waste Injection Restrictions

State Drinking Water

RCW Chapter 90.48 Water Pollution Control
RCW Chapter 43.20 State Board of Health Authority to adopt rules to protect public water supplies
RCW Chapter 70.119A - Washington's Safe Drinking Water Act
WAC Chapter 173-218 - Underground Injection Control Program
WAC Chapter 173-200 - Water Quality Standards for Ground Waters of the State of Washington
WAC Chapter 246-290 - Group A Public Water Systems
WAC Chapter 246-291 - Group B Public Water Systems

Whatcom County Drinking Water

Whatcom County Code 24.11 Drinking Water

Navajo EPA

Title 22, Navajo Nation Code, Chapter 11- Water Code, Subchapter 15- Navajo Nation Safe Drinking Water Act as Amended March 8, 2001.

Navajo Nation Public Drinking Water System Regulations